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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. ~~1298~~ 125

REUBEN KEMP, JR.,

Appellant,

against

WILLIAM S. HULTS, as Commissioner of the Bureau of Motor Vehicles,

Appellee.

STATEMENT AS TO JURISDICTION

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STATUTE INVOLVED

New York Vehicle and Traffic Law,
Section 501(1)(a) 2, 5, 6, 7, 9
Section 510(3)(c) 3, 7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. .....

REUBEN KEMP, JR.,

Appellant,

against

WILLIAM S. HULTS, as Commissioner of the Bureau of Motor Vehicles,

Appellee.

STATEMENT AS TO JURISDICTION

Opinions Below

The Court of Appeals wrote opinions. The majority opinions and the dissenting opinion of three judges are appended hereto as Appendix A. Neither the Appellate Division nor the court of original jurisdiction wrote any opinions.

Jurisdiction

(i) This case arises from a judgment entered in the Supreme Court of the State of New York, County of New York, which denied appellant's application to review the determination of the appellee. The appellee had determined to reject the application of Kemp for an operator's license to operate a passenger automobile for his own pleasure. The rejection was rested on the appellant's

character, having nothing to do with his competence to safely operate a motor vehicle on the highways.

(ii) The judgment of the Court of Appeals affirming by a 4 to 3 vote the determination of rejection was made and entered March 31, 1966, Appendix B.

The Court of Appeals granted an order on April 28, 1966 amending its remittitur to include the following:

> "Motion to amend the remittitur granted, the return of the remittitur requested and, when returned, it will be amended by adding thereto the following: Upon the appeal herein, there were presented and necessarily passed upon questions under the Constitution of the United States, viz.: Petitioner contended that to deny him a driver's license for reasons not directly related to his ability to operate a motor vehicle, e.g., for not disclosing his entire record of convictions, violated his rights under the privileges and immunities clause of the Fourteenth Amendment as well as his rights under the due process clause of that amendment rights under the due process clause of that amendment. The Court of Appeals held that petitioner's constitutional rights had not been violated."

The Notice of Appeal to this court was filed on April 29, 1966 in the Supreme Court of the State of New York, County of New York, the court possessed of the record.

(iii) Jurisdiction is conferred on this court by 28 U.S.C. Section 1257(2).

Statutes Involved

The statutes involved are:

New York Vehicle and Traffic Law, Section 501(1)(a):

> "An application for a license to operate motor vehicles, as an operator or chauffeur, may be made, by mail or

otherwise, to the Commissioner or his duly authorized agent upon blanks prepared under authority of the commissioner and an applicant shall furnish such proof of his fitness as the commissioner shall in his discretion determine. . . .

* * * *

Before a license is granted, the applicant shall pass such examination as to his qualifications as the commissioner shall require."

New York Vehicle and Traffic Law, Section 510(3)(c):

"Permissive suspensions and revocations. Such licenses and certificates of registration and the privilege of a non-resident of operating a motor vehicle or motorcycle in this State . . . may be suspended or revoked.

* * * *

(c) Because of the conviction of the holder at any time of a felony; . . ."

Questions Presented

1. Do the statutes as construed below violate the privileges and immunities of Kemp by barring him from the use of the highways because of his prior criminal record, totally unrelated to the operation of a motor vehicle?

2. Do the statutes as construed violate appellant's privileges and immunities by making character a test of fitness to operate an automobile for one's personal use?

3. May the use by appellee of the prior convictions of Kemp for offenses having no relation to his ability to operate a motor vehicle be used to deprive him of a license to operate an automobile without denying due process to him?

4. May the appellee interfere with interstate commerce by withholding an operator's license based on the character of the applicant?

5. Was appellant denied the privileges and immunities of a citizen of the United States and denied due process of law by a construction and application of the statutes by the Court of Appeals attempting to justify the denial of a license because the appellant had omitted (without any showing of wilfulness) from his application for the operator's license of a conviction for a trespass when he was 15 years of age although he did disclose in the application convictions for assault and murder?

6. Was appellant denied the privileges and immunities of a citizen of the United States and denied due process of law by a construction of the statutes by the Court of Appeals wherein the Court of Appeals injected as a ground for denial of the operator's license, the fact that appellant had omitted the aforesaid trespass conviction, although appellee Commissioner did not rest his determination on that ground?

7. Was appellant denied the privileges and immunities of a citizen of the United States and denied due process of law by a construction of the statutes by the Court of Appeals wherein the Court of Appeals stated as a ground for denial of the operator's license, the fact that appellant had omitted the aforesaid trespass conviction, although the Commissioner was not prejudiced by the omission and possessed, through routine investigation, the information concerning the alleged trespass conviction?

8. Is not the statute, as construed by the Court of Appeals, an impermissible bill of attainder?

Statement

The appellant, a person of about 38 years of age in 1965, applied for a license for operating a motor vehicle. In his application he disclosed that in 1947 and 1961 he had been convicted for crimes. Neither of the convictions related to the manner of the operation of a motor vehicle. Because of his criminal record alone, the appellee rejected his application.

In order that the statement of facts be free from confusion, it is necessary to point out that prior to appellant's application for an *operator's* license, he had applied for a chauffeur's license, which also had been denied for the same reason. But that rejection is *not* the subject of this proceeding.

The appellee's rejection of the application for an operator's license is alleged in paragraph "5" of the petition which sets forth the Commissioner's letter in which he speaks of Kemp's record "which discloses disregard for law." This is admitted in appellee's affirmative defense found in paragraph "Thirteenth" and Exhibit G annexed to it; also in Exhibit M. These are amplified by the Commissioner's affidavit in which he states: "This conclusion was based upon the fact that petitioner's background and record disclose a consistent disregard for the law up to the time of his release from jail in November, 1964. This disregard for the law is especially evidenced by his convictions for Murder and Assault. Those convictions indicate a lack of respect and consideration for the rights and personal safety of other people. If this lack of consideration were to be transplanted onto the public highways of this State, there would be substantial risk that the petitioner would endanger the personal safety and property of other persons using the highways • • • On the basis of these considerations, I concluded that the petitioner was not a fit person within the meaning of Vehicle and Traffic Law

§ 501 (i) (a) to have a license to operate a motor vehicle at the present time" (R. pp. 43, 44).

So that there could be no doubt, the appellee makes clear that the ground for the appellant's rejection was his criminal record, of the assault and murder charges. The appellant's "propensity to disregard the law in the other areas of conduct" (apellee's affidavit) can in this record refer to his conviction for trespass in Mississippi in 1942, when he was 15 years of age (Exhibit L of Answer). There were no other convictions. The murder charge in Mississippi in 1947 (a felony), when petitioner was 20 years of age, was the killing of his father-in-law; paroled in 1957. The assault conviction in 1961 (a misdemeanor) was the stabbing of a paramour (Exhibit N); paroled in 1964.

None of these crimes involved the manner of the operation of a motor vehicle.

It is necessary that this Statement should emphasize that the Commissioner did not reject the appellant because of any incompleteness or omissions in his application. The pleadings and affidavit of the appellee show beyond dispute that the sole reason the application was rejected was because the Commissioner felt that the criminal record of Kemp showed that he was unfit to operate an automobile for his own use. (R. 11 Answer, SECOND admits allegation "5" of Petition R. 8; and Affidavit of the Commissioner R. 43 where after stating that prior convictions indicate a disregard for law, he states, "on the basis of these considerations, I conclude that the petitioner was not a fit person, within the meaning of Vehicle and Traffic Law § 501(1)(a), to have a license to operate a motor vehicle at the present time.")

The opinions of the majority of the Court of Appeals insofar as they inject this additional factor, is erroneous as to fact. First, the Commissioner did not reject the appellant because he had not disclosed his complete record. Sec-

ond, the opinion of the majority states that Kemp omitted his conviction for burglary. There is no conviction for a burglary. The Record (Ex. L.P. 38) shows that there had been an arrest and investigation of a burglary; that is all. As for the omitted conviction for trespassing in 1942, Kemp was 15 years of age at the time (at the time of his application he was 38). As for the memorandum of Judge Keating in stating that Kemp had omitted the conviction for murder on his prior application, the answer is that the prior application has no bearing on the present application. In the present application he stated that he had been convicted for assault and murder.

Suffice it to state, in either application there was no materiality of the claimed omission because there could not have any prejudice to the Commissioner. The Commissioner states in his affidavit (R. 43) that when the prior application disclosed a conviction he immediately made an investigation as a matter of routine and learned of Kemp's entire record. Therefore, he could not have been prejudiced at any time. And when Kemp again applied, he had the entire record before him.

The Commissioner therefore in denying the application said not a word about any incompleteness in the application. He rested his denial solely on his decision that the criminal record showed unfitness to operate a motor vehicle. And his counsel argued further that because Section 510(c)(3) authorizes a revocation of a license upon conviction for a felony, Section 501(1)(a) must be construed to authorize rejection because of a prior felony conviction.

The sole quarrel therefore between Kemp and the Commissioner was that the Commissioner asserted a right to reject an applicant based on his character, his criminal record. Kemp, however, asserts that such a power runs afoul of the Federal Constitution, if the character test had no relation to the ability to operate a car.

Stage and Manner of Raising Federal Questions

The repugnancy of the New York statutes to the Federal Constitution was raised at the very inception of these proceedings by the Petition (R. 10, paragraphs 10, 11, 12, 13 and 14).

The questions were raised and passed upon in the Court of Appeals, as its opinions, both majority and minority indicate; and as its certificate so shows. As for the latter, it should be emphasized that appellant contended that his constitutional rights would be impaired if the license were denied for reasons not directly related to his ability to operate a motor vehicle. The certificate states, "Petitioner contended that to deny him a driver's license for reasons not directly related to his ability to operate a motor vehicle." The example ("e.g.") given by the certificate, "for not disclosing his entire record of convictions" is a misplaced emphasis. The emphasis (as the minority opinion of Chief Judge Desmond and Judges Fuld and Van Voorhis makes clear) is that the denial of the license based on his record of prior convictions not directly related to his ability to drive was a denial of his constitutional rights. To additionally deny the license because of failure to give a complete record, especially as in this case when no prejudice resulted therefrom, would also be a denial resting on character.

The Questions Are Substantial

The substantiality of the issues is presented by the dissenting opinions of Chief Judge Desmond and Judges Fuld and Van Voorhis when they said:

> "DESMOND, CH. J., FULD and VAN VOORHIS, JJ.:
>
> We dissent and vote to reverse and to grant the relief asked by petitioner on these grounds: first, that section 501 (subd. 1a) of the Vehicle and Traffic Law does not authorize the Commissioner to investigate an

> applicant's character or morals but only his 'fitness', i.e., his ability to drive a car; second, that, as construed by the court, the statute is unconstitutional as a delegation of legislative power without standards (*Packer Collegiate Inst.* v. *University of State of N. Y.*, 298 N. Y. 184); and third, that the statute, as now construed and applied, violates the 'privileges or immunities of citizens' provision of the Fourteenth Amendment to the Federal Constitution since it interferes with the common right to use the public highways (see *Williams* v. *Fears*, 179 U. S. 270, 274)."

Section 501(1)(a), as construed by the majority authorizes the Commissioner to pass upon an applicant's morals and character and may reject an applicant on that account. We contend that such a construction violates appellant's privileges and immunities under the Federal Constitution because it interferes with his right to use the highway and also interferes with interstate commerce. We also contend that such a requirement would deny him due process of law. We also contend that any injection by the court below of the omission of the trespassing conviction in the present application as justification for the denial of an operator's license is an impairment of Kemp's constitutional rights under the same clauses.

1. Appellant, Kemp, has been deprived of his privileges and immunities as a citizen of the United States. The appellant is a citizen. He has sought to use the highways through the medium of a motor vehicle. In order to operate a motor vehicle on the highways he must possess a license to do so. Such a license has for its purpose the regulation of the use of the highways by persons who can safely operate a motor vehicle and to identify the operator and to indemnify other users against the operator's incompetence.

In *Matter of Wignall* v. *Fletcher*, 303 N. Y. 345, and *Matter of Moore* v. *MacDuff*, 309 N. Y. 35, New York held

that an ordinary operator's license is not a mere privilege, but a right.

In *Williams* v. *Fears,* 179 U. S. 270, 274, this court said:

> "Undoubtedly the right of locomotion, the right to remove from one place to another according to inclination, is an attribute of personal liberty, and the right, ordinarily, of free transit from or through the territory of any State is a right secured by the Fourteenth Amendment and by other provisions of the Constitution."

In *Edwards* v. *California,* 314 U. S. 160, the Court held that the right to move from place to place was an attribute of national citizenship.

In that case it was sought to circumscribe the movement of "indigent" people. The prohibition was directed against the character of the person who sought to move about. Yet, it was held that the character of a person could not be used as a test of his right to move about. That stricture applied to the person seeking to move about, whether on foot, on horseback or in a carriage.

Had a character test been devised to qualify a person to use the highways on foot, such a test would readily have met constitutional doom. What difference is there in principle when the use is by horse, carriage or automobile? In each case the use of the highways is sought.

The decisions of this court therefore clearly point in one direction, that character cannot be used as a test for determining a person's right to move about.

To any assertion that the prior convictions of this petitioner has a bearing on the safety of persons using the highway because a motor vehicle may be used in furthering criminal activities, the answer is that the commission of a crime does not require the use of a motor vehicle. Crimes of any sort may be committed by per-

sons on foot. Yet would it be regarded as constitutional or reasonable to require persons on foot to obtain a license based on their character in order for them to use the streets?

Moreover, what basis is there for assuming that a person who had been convicted of a crime will again commit one? The conviction and punishment of persons in the administration of criminal law rests on the principle that convicting a person for his crime and punishing him will result in a reformed person, who will not return to evil ways. Therefore, a supposition that the former convict must be specially treated and even denied a license has little rational support. The assumption has no support in constitutional law since what is inferred is contrary to reasonable experience. *Bailey* v. *Alabama*, 219 U. S. 219, 234, and merely provides a type of bill of attainder.

The Commissioner contends that he may reject the license of one seeking the use of the highways on the basis of prior convictions for crime (and this could apply to a record based on misdemeanors as well as felonies) because such convictions show a disregard for law, and therefore will reflect upon the ability to safely operate a motor vehicle. This argument is not supported by any scientific evidence. The observation of the Commissioner is not supported by experience. The facts of life on the contrary show that a person can be the most law-breaking person, yet be an excellent and careful driver. The converse is also true, that many of the most law-abiding persons are habitual violators of motor vehicle laws and regulations.

What does the Commissioner mean when he says that the convictions for murder and assault indicate a lack of respect and consideration for the rights and personal safety of other people? If it means that his emotional state in committing crimes against certain persons will

necessarily be transferred to his manner of operating a motor vehicle, he has skipped a vital link and that is, etiological proof that one follows from the other. It is not enough to rest a denial of a person's constitutional rights to use highways, intrastate and interstate on a bald assertion. The burden of proof to sustain such a denial is on the Commissioner.

The Commissioner's hesitancy in this respect is evident in his affidavit statement, "*If* this lack of consideration were transplanted onto the public highways of this State * * *." The "if" is a big word. It must be demonstrated that it will be transplanted. He merely assumes it from guesswork or hunch. The fact that he is a commissioner does not entitle him to state conclusions which another person would have to prove. And since he has denied a citizen of the United States of his rights he has to justify his reasons scientifically. Nor can he rest on the routine ritual that it was the "exercise of his judgment and discretion." Fortunately, the Constitution of the United States which is invoked in this case requires more than the recitation of the ritualistic terms.

The Commissioner's attempts to avoid the invalidity of his conduct by the excuse that a criminal record shows a disregard for law and therefore unfitness to drive a car, is plainly disingenuous. If the convictions affect the ability to drive safely, then how can he attempt to mitigate his determination by stating that the rejection is for "the present time" (R. 44 first complete paragraph). If the defect resulting from the criminal record results in unsafe driving, it cannot be said that it is a defect and disqualification for "the present time" only. The answer is that the Commissioner when faced with this challenge to an assumed power to reject because of a criminal record, sought some respectable cover, and seized upon the thin "disregard for law" shelter. This led him into the contradiction just exposed.

2. The appellant has been denied a license because of his former convictions. This factor has no relation to his ability to drive a car. In fact, the record shows that appellant was found competent to drive (R. 9 par. 8).

Because the denial of the license rested on reasons other than his qualification to drive a car, Kemp was denied due process. *Wieman* v. *Updegraff*, 344 U. S. 183, 191; *Schware* v. *Board of Bar Examiners*, 353 U. S. 232, 238, which, among other cases therein cited, hold that a rational connection must exist for the deprivation of a license, and the grounds must be related to the activity for which the license is sought.

3. Although the record does not show that Kemp presently needs a car for crossing state lines, nevertheless, it can be reasonably anticipated in these days of interstate communication that sooner or later such need may be felt. Since he has been denied a license with no right to ever get one (any other grant would be one of *favor* by the appellee), there is an interference with use of a car for such purposes.

Modern highways know no state barriers in the context that one flows into the other. A traveler in New York may be in New Jersey, Connecticut or Pennsylvania in a matter of minutes. Without a license, appellant is deprived of the opportunity of using the highways as a part of interstate communication and thus, there is an interference with interstate commerce. *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196, 203; *Mitchell* v. *United States*, 313 U. S. 80.

This Court in the *Edwards* case held that the interference with the travels of "indigent" persons across state boundaries was a burden on interstate commerce. What was said there, applies here.

4. Likewise, any rejection because of the omission by appellant of his conviction for trespassing would likewise

operate to deprive him of his constitutional protections. It has been shown that the opinion of the Court of Appeals is in error in stating that Kemp also omitted a conviction for burglary—such conviction is non-existent. The Court of Appeals injected this element into the case, although it was not the basis for the rejection by the Commissioner. The record is clear beyond dispute that the denial of the license rested solely on the conviction record of Kemp. Nevertheless, the arguments made with respect to the denial resting on the conviction record, apply here. The denial of the application because of the omitted conviction for trespass is also one based on the character of the applicant.

5. The statute does not authorize a rejection because of an incomplete application. From a practical point of view, if an application is incomplete, the Commissioner could insist upon its completion. He did not do so; instead, he denied the application for a different reason. The only penalty provided by statute is one of misdemeanor for making a false statement, Vehicle and Traffic Law, Section 392. The Commissioner has not asserted such a penalty against appellant or even claimed his application to be false.

6. Moreover, since the appellee seeks to exercise a power to reject because of a criminal record, and such exercise is unconstitutional, the information sought concerning prior criminal convictions is irrelevant. The withholding of a license for irrelevant questioning thus operates as a penalty and is a denial of due process. *Kent* v. *Dulles,* 357 U. S. 116. *Chaunt* v. *United States,* 364 U. S. 350.

7. The Court of Appeals majority memorandum of three judges recognizes that the withholding of a license does not provide a limit of time appellant may be deprived of his right to use the highways. The opinion said there is discretion in the Commissioner, but does not state for how long

he may withhold. This without more, is a denial of due process, since it permits the Commissioner to determine for himself how long it may be before Kemp may use the highways. The use tomorrow may be of great importance to Kemp. Yet the decision of the three judges permits the appellee to withhold the use for an undetermined time.

CONCLUSION

Review should be granted because this case presents a novel case, decided by a 4 to 3 vote of the New York Court of Appeals. We have shown that Kemp has been deprived of his right to use the public highways by automobile because the Commissioner did not think him a fit person to do so merely because of appellant's record of previous convictions unrelated to the operation of a motor vehicle.

Respectfully submitted,

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EXHIBIT A

Opinions.

The order of the Appellate Division should be affirmed. The record before us demonstrates that, on his application for an operator's license, the petitioner did not disclose his entire record of convictions, i.e., he merely divulged his convictions for murder and assault, omitting those for burglary and trespassing. We hold this concealment, although it is not directly related to petitioner's fitness to drive an automobile, is a legitimate ground upon which the Commissioner may exercise his broad statutory powers and deny the petitioner an operator's license, without violating any of the petitioner's rights under the Federal Constitution.

Even if we were to consider the question whether the Commissioner abused his discretion in denying this application, we would hold that there was no abuse of discretion (see *Matter of Funaro* v. *Hults*, 16 A D 2d 654). However, this is not to say that the Commissioner may deny petitioner a license for an indeterminate period of time merely because of the two felonies and the false statements on this application and on a previous one. The time may come when a denial by the Commissioner may be classified as arbitrary; but under the facts before us now, there was no such abuse of discretion.

KEATING, J. (Concurring):

I agree that the order of the Appellate Division should be affirmed.

The Commissioner has ample power to require information concerning an applicant's criminal background since, in my view, criminal conduct is reasonably related to an applicant's "fitness" to operate a motor vehicle. Fitness includes conduct which indicates a general disregard for

the law and for the safety of others. Petitioner's criminal record discloses a 1940 conviction for burglary, a 1947 conviction for murder, and a 1961 conviction for assault. These substantive crimes are sufficient justification for denying petitioner's application for an operator's license at the present time.

In addition, petitioner's concealment of his conviction for murder on his prior application for a chauffeur's license and his concealment of his burglary conviction on this application justified the Commissioner's exercise of discretion in denying the present application for an operator's license.

DESMOND, CH. J., FULD and VAN VOORHIS, JJ. (dissenting memorandum):

We dissent and vote to reverse and to grant the relief asked by petitioner on these grounds: first, that section 501 (subd. 1a) of the Vehicle and Traffic Law does not authorize the Commissioner to investigate an applicant's character or morals but only his "fitness", i.e., his ability to drive a car; second, that, as construed by the court, the statute is unconstitutional as a delegation of legislative power without standards (*Packer Collegiate Inst.* v. *University of State of N. Y.*, 298 N. Y. 184); and third, that the statute, as now construed and applied, violates the "privileges or immunities of citizens" provision of the Fourteenth Amendment to the Federal Constitution since it interferes with the common right to use the public highways (see *Williams* v. *Fears*, 179 U. S. 270, 274).

* * * * * *

Order affirmed. Memorandum opinion. All concur; Keating, J., in a separate memorandum except Desmond, Ch. J., Fuld and Van Voorhis, JJ., who dissent and vote to reverse in a separate memorandum.

APPENDIX B

COURT OF APPEALS

State of New York, ss:

Pleas in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 31st day of March, in the year of our Lord one thousand nine hundred and sixty-six, before the Judges of said Court.

Witness,

THE HON. CHARLES S. DESMOND,
Chief Judge, Presiding,

RAYMOND J. CANNON, Clerk.

Remittitur March 31, 1966.

No. 535

In the Matter of the Application

of

REUBEN KEMP, JR.,

Petitioner-Appellant,

For a Review of the Determination of WILLIAM S. HULTS, as Commissioner of the Bureau of Motor Vehicles,

Respondent-Respondent.

BE IT REMEMBERED, That on the 4th day of December in the year of our Lord one thousand nine hundred and sixty-five, Reuben Kemp, Jr., the appellant—in this cause, came

here unto the Court of Appeals, by Emanuel Redfield, his attorney and filed in the said court a Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the First Judicial Department. And William S. Hults, as Commissioner of the Bureau of Motor Vehicles, the respondent—in said cause, afterwards appeared in said Court of Appeals by Louis J. Lefkowitz, Attorney General.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, The said Court of Appeals having heard this cause argued by Mr. Emanuel Redfield of counsel for the appellant—, and by Mr. Michael H. Rauch of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed without costs.

And it was also further ordered, that the record aforesaid, and the proceeding in this Court, be remitted to the Supreme Court of the State of New York, there to be proceeded upon according to law.

THEREFORE, it is considered that the said order be affirmed, without costs, &c., as aforesaid.

AND hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, and by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided,

to be enforced according to law, and which record now remains in the said Supreme Court before the Justices thereof, &c.

RAYMOND J. CANNON
Clerk of the Court of Appeals
of the State of New York

Court of Appeals, Clerk's Office,

Albany, March 31, 1966.

I hereby Certify, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

(Seal)

RAYMOND J. CANNON,
Clerk.

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IN THE

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OCTOBER TERM, 1966

No. 125

REUBEN KEMP, JR.,

Appellant,

against

WILLIAM S. HULTS, as Commissioner of the Department of Motor Vehicles of the State of New York,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

MOTION TO DISMISS OR AFFIRM

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 1298

REUBEN KEMP, JR.,

Appellant,

against

WILLIAM S. HULTS, as Commissioner of the Department of Motor Vehicles of the State of New York,

Appellee.

MOTION TO DISMISS OR AFFIRM

The appellee, Commissioner of the Department of Motor Vehicles, of the State of New York, moves that this appeal be dismissed or, in the alternative, that the final judgment of the Court of Appeals of New York State, as amended, be affirmed.

Opinions Below

The opinions of the New York State Court of Appeals dated March 17, 1966 are reported at 17 N. Y. 2d 191 and appear as Appendix A to appellant's jurisdictional statement. The order amending the remittitur of the New York Court of Appeals is not yet reported but appears at page 2 of the jurisdictional statement.

Contrary to appellant's statement, the court of original jurisdiction, the Supreme Court of the State of New York,

County of New York, did write an opinion which is unreported but appears in the Record on Appeal in the state courts at pages 4-5.

Jurisdiction

Appellant seeks to invoke the jurisdiction of this Court under United States Code, Title 28, § 1257(2).

Questions Presented

Does this Court have jurisdiction to hear this appeal under 28 U.S.C. § 1257(2)?

Was the appellant deprived of any rights under the Constitution when the appellee rejected his application for a motor vehicle operator's license where, in the application, the appellant failed to divulge his entire record of convictions as required?

Was the appellant deprived of any rights under the Constitution when the appellee rejected his application for a motor vehicle operator's license, in view of appellant's persistent disregard of the law, particularly the propensity for crimes of violence as demonstrative of his lack of fitness to operate a motor vehicle with due regard for the safety of others?

Statement

On or about January 21, 1965 the appellant applied to the appellee, Commissioner of the New York State Department of Motor Vehicles, for a chauffeur's license. In response to Question 13 on the application form, which asks applicants to state their entire record of crimes, infractions or offenses, the appellant responded that he had been previously convicted of the crime of Assault (19).*

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* Numbers in parentheses, unless otherwise indicated, refer to pages in the Record on Appeal in the New York Court of Appeals.

However, a routine investigation revealed that petitioner had failed to divulge a 1947 conviction for the crime of Murder in Mississippi, as well as other arrests and convictions dating back to 1940 (20-25). Moreover, appellant was asked to complete a form listing all felonies and all misdemeanors where the sentence was over sixty dollars, sixty days or probation. On this form (26), dated February 24, 1965, appellant again disclosed only the 1962 conviction for assault in New York and again did not divulge any facts relating to his criminal record outside New York. Appellant also stated on this form that he needed a license because the mechanic's union required one and it would enable him to get a better job. By letter dated April 5, 1965 the appellee denied appellant's application for a chauffeur's license (29). Upon appellant's request, this action was referred to the Board of Appeals and Review of the Department of Motor Vehicles and, upon that Board's recommendation, concurred in by the appellee, the denial was adhered to by letter dated April 23, 1965 (40). No judicial proceeding to review this administrative action was instituted.

Meanwhile, on April 12, 1965 appellant filed another application for a license, this time for an operator's license, and, for the first time, divulged in this application a previous conviction for murder in addition to an assault conviction (31). Again appellant did not disclose a 1940 conviction for burglary besides a 1942 conviction for trespassing (39). Accompanying this application, appellant filed a statement which, referring only to the assault and murder convictions, stated that appellant was not on parole and needed a license because an automobile would help him in his part-time job as a cosmetic salesman (32-33). This application was denied on June 11, 1965 (42), the appellee concluding that the appellant was not "at the present time" a fit person to have a license to operate a motor vehicle within the meaning of New York Vehicle and Traffic Law § 501(1)(a) because of appellant's disre-

gard for the law "especially evidenced" by the convictions for murder and assault which "indicate a lack of respect and consideration for the rights and personal safety of other people" (44).

By petition dated June 16, 1965, appellant instituted a proceeding under New York Civil Practice Law and Rules, Article 78, to review the appellee's determination denying the operator's license (7-11). The appellant made no allegation that the appellee's determination was an abuse of discretion or arbitrary but claimed instead only that New York Motor Vehicle Law § 510(c)(3) was unconstitutional for various reasons if it were construed to empower appellee to withhold a license for conviction of a crime not connected with the physical operation of a motor vehicle. There was no allegation in the petition that the delegation in New York Vehicle and Traffic Law § 501(1)(a) to the appellee of the power to determine fitness violates the Constitution.

In a decision dated July 23, 1965 the Supreme Court, New York County (DICKENS, J.) dismissed the petition, holding that the petition was defective under New York Civil Practice Law and Rules, Article 78 and that the appellee's refusal of a license "based upon [appellant's] general 'disregard for the law', as indicative of his lack of demonstrated fitness, and as evidenced by his prior criminal record and otherwise, was amply justified as a matter of law and discretion" and that the appellee "might well have also considered [appellant's] false statements made on the very license applications herein in determining his fitness to operate a motor vehicle on our public highway" (4-5). This decision was unanimously affirmed without opinion by the Appellate Division of the Supreme Court, First Department, by order dated November 16, 1965 (48-49). 24 A. D. 2d 934, —— N.Y.S. 2d ——.

On appeal to the New York Court of Appeals, the majority of that Court held that the failure of the appellant

to disclose his entire criminal record on the license application forms was sufficient justification for the denial of the present application for a license. Appellant then moved to have the remittitur of the Court of Appeals amended to indicate which constitutional questions that Court had passed upon. The Court of Appeals stated clearly in its order amending the remittitur that it had passed only upon the contention that it violated appellant's constitutional rights to deny him a license "for reasons not directly related to his ability to operate a motor vehicle —e.g., for not disclosing his entire record of convictions" on his applications. By motion returnable May 31, 1966 the appellant has sought an additional amendment of the remittitur of the New York Court of Appeals. Any decision on such motion cannot, of course, affect the status of the instant appeal or the issues presented by the case in the posture in which appellant chose to bring it to this Court.

POINT I

This Court lacks jurisdiction under 28 U.S.C. § 1257(2) since the decision of the New York Court of Appeals did not sustain the validity of a state statute against a constitutional attack.

In the petition by which this proceeding was instituted, appellant urged that New York Vehicle and Traffic Law § 510(c)(3) was invalid as an abridgement of his rights under the Constitution, if it were construed to empower the appellee to deny him a license under the circumstances of this case. This section, dealing with license revocations, was obviously not so construed either by appellee or by the New York courts, although appellee did argue in the state courts, *inter alia,* that this section implicitly supported his determination as a matter of discretion. However, the appellee did not rest his determination on this

section (43-45) and the Court of Appeals made no mention of it in any of its opinions.

The only other possible state statute the constitutionality of which could be involved here is New York Vehicle and Traffic Law § 501(1)(a). The petition in the New York Supreme Court (7-11) makes no mention of this section and appellant has never challenged the validity of this general licensing statute. On the contrary, appellant insisted in the state courts that he was *not* challenging the validity of § 501(1)(a). Indeed, it was necessary for appellant to maintain such a position because, under New York law, a litigant cannot in the same proceeding attempt to compel the issuance of a license and challenge the constitutionality of the licensing statute. *Matter of Diocese of Rochester* v. *Planning Board of the Town of Brighton,* 1 N. Y. 2d 508, 519-520, 136 N. E. 2d 827, 832.

Thus, appellant claimed only that the appellee had imposed invalid conditions in administering a concededly valid statute. And the Court of Appeals simply decided that, whatever the scope of the appellee's power to determine fitness under § 501(1)(a), appellee could not be mandated by the courts to issue a license on the basis of applications which concealed part of the information requested. The fact that the Court decided that appellant's constitutional rights were not violated by the rejection of such an application does not mean that the constitutionality of the statute was either reached or decided upon. Indeed, appellant's motion to amend the remittitur specifically requested the Court of Appeals to certify that it had passed upon and sustained the validity of §§ 501(1)(a) and 510(c)(3) and the Court declined to do so.

Under these circumstances, appellant has failed to establish that this Court has jurisdiction under 28 U.S.C. § 1257 (2). On the contrary, it has been consistently held in this Court that a challenge to the constitutionality of the ex-

ercise of authority under a statute whose validity is not attacked, as in this case, is insufficient to support appellate jurisdiction in this Court. *Wilson* v. *Cook*, 327 U. S. 474; *Jett Bros. Co.* v. *City of Carrollton*, 252 U. S. 1.

POINT II

Appellee's rejection of the appellant's application for a driver's license does not raise a substantial federal question.

A.

Although appellant's jurisdictional statement purports to raise eight separate questions, it is apparent, both from the majority opinions in the New York Court of Appeals and from that Court's order amending its remittitur, that the only question which was reached and decided below was whether appellant's constitutional rights were violated when the appellee rejected his license application which contained concealments amounting to false statements. The Court of Appeals held only that such a rejection did not violate appellant's rights. The Court considered appellee's broad powers to include the power to reject a license application containing false statements. Accordingly, this is the only question which can be properly raised by appellant in seeking review by this Court. See, *e.g.*, *Whitney* v. *California*, 274 U. S. 357; *Herb* v. *Pitcairn*, 324 U. S. 117.*

Thus, the instant proceeding as passed upon by the New York courts does not involve the power of a state to deny

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* Special mention should be made of appellant's reference to bill of attainder in his jurisdictional statement (p. 4). This contention was not mentioned in the petition by which the proceeding in the state courts was initiated and was never either briefed or argued in the New York courts. Appellant attempted to inject it into the case for the first time in his reply brief in the New York Court of Appeals but appellee pointed out that this belated contention was not available to appellant and the Court of Appeals properly made no reference to it.

a driver's license to convicted felons, whether or not their convictions arose directly from the operation of a motor vehicle. Nor does it involve the question of whether or not the criminal record of this particular appellant was sufficient cause to deny him a license. As the appellee argued and as the court of orginal jurisdiction held, the petition totally failed as a matter of New York law properly to raise the factual question of whether the appellee's action had been arbitrary or that appellee had abused his discretion. See *Matter of Graffenberg Dairy* v. *DuMond*, 278 App. Div. 428, 106 N.Y.S. 2d 1. Likewise, this case does not involve the question of whether or not the particular false statements made by appellant were sufficient as a factual matter to justify the appellee's rejection of the application. Since the appellant failed to make sufficient allegations to question the appellee's determination as a factual matter, the question which the Court of Appeals decided was the pure question of the power of the appellee to reject an application containing false statements and that is the only question upon which the appellant can properly seek review in this Court. This, we submit, is not a substantial federal question for plenary review by this Court. *Federal Communications Commission* v. *WOKO, Inc.*, 329 U. S. 222, 227; *Mester* v. *United States*, 332 U. S. 749; *F.C.C.* v. *Broadcasting Service Organization, Inc.*, 337 U. S. 901.

B.

Whether a motor vehicle license is considered a right or a privilege, the power of the states to regulate the use of the highways as an adjunct of the police power has never seriously been questioned and is not disputed by the appellant. As the New York Court of Appeals has stated, "The underlying purpose of all legislation relating to motor vehicle traffic is the regulation of such traffic for the protection and safety of the public at large. . . . The licensing system is the keystone of all legislative safeguards deemed

necessary to protect the public against death and mutilation." *People* v. *Duell,* 1 N. Y. 2d 132, 134 N. E. 2d 106, 108. The natural incident of the undisputed power to require licenses and to condition the granting of such licenses upon an applicant's meeting certain standards is the necessity for obtaining information relative to these standards. The ability to administer standards to protect the health and safety of the public depends upon the accuracy and reliability of the information available to the administrative agency. Thus, it is a misdemeanor in New York to make intentional false statements on an application for a motor vehicle operator's license. New York Vehicle and Traffic Law § 392.

In this context, the rejection of appellant's application is clearly justifiable as a necessary incident of the police power to license, whether or not the false statements are directly related to appellant's physical ability to drive as such. Indeed other barriers not related to an individual's physical ability to drive as such—*e.g.,* minimum age requirements and financial security laws are common prerequisites to licenses to operate a motor vehicle. As this Court has held, the police power in this area is so broad that "Any appropriate means adopted by the states to insure competence and care on the part of its licensees and to protect others using the highways is consonant with due process." *Reitz* v. *Mealey,* 314 U. S. 33, 36.

Even the most stringent standards of due process do not require that a license be issued on the basis of an application which contains false statements. Thus, the New York Court of Appeals refused in this case to issue an order pursuant to New York Civil Practice Law and Rules Article 78 compelling the issuance of a license on the basis of the appellant's applications. Where a rejected applicant such as the appellant seeks to compel the issuance of a license, the burden imposed upon him under New York law is to establish "as a matter of law, that *no* valid ground" exists

for the denial of a license. *Matter of Elite Dairy Products* v. *Ten Eyck*, 271 N. Y. 488, 493, 3 N. E. 2d 606, 608. In cases involving all sorts of licensed activities the Court of Appeals has refused to compel an administrative body or officer to issue a license where the application contains false statements. See, *e.g.*, *Matter of Oseroff* v. *Cantor*, 16 N. Y. 2d 924, 212 N. E. 2d 435; *Matter of Sabel* v. *Hults*, 9 N. Y. 2d 987, 176 N. E. 2d 513; *Matter of College Point Wine & Liquor, Inc.* v. *O'Connell*, 296 N. Y. 752, 70 N. E. 2d 554; *Matter of Arroyo* v. *Moss*, 295 N. Y. 754, 65 N. E. 2d 570. However, the Court has frequently indicated, as it did in this case, that future applications containing full disclosure should not automatically be rejected solely for prior failures to disclose. In this regard it should be emphasized that the appellee has, from the beginning of this case, made it clear that the denial of a license was only for the "present time" (44, 45). Thus appellant's insinuation that he has been permanently deprived of the possibility of obtaining a driver's license is plainly without foundation either in law or in fact.

C.

Appellant's constitutional arguments are wholly untenable. This Court has consistently held that the power of the federal government to regulate interstate commerce does not disable the states from adopting and administering reasonable measures in the exercise of its police powers. See, *e.g.*, *Ferguson* v. *Skrupa*, 372 U. S. 726; *California* v. *Zook*, 336 U. S. 725; *Clason* v. *Indiana*, 306 U. S. 439. In any event, the commerce clause argument is frivolous since the appellant concedes that he does not seek or need a license in order to engage in interstate commerce. His contention that "sooner or later" (Br. p. 13) he might wish to do so fails to establish any present burden whatsoever. And, even if it did, the denial of the application under review is, as we have shown, a necessary and valid incident to the execution and admin-

istration of the broad and pervasive power of the states to regulate the use of their highways. *South Carolina Highway Dept.* v. *Barnwell Bros.*, 303 U. S. 177; *Maurer* v. *Hamilton*, 309 U. S. 598.

Similarly, appellant's claim that he has been denied privileges and immunities is without substance. In *Williams* v. *Fears*, 179 U. S. 270, this Court, recognizing the individual's right of locomotion, nevertheless upheld a tax on persons who hire out of state labor against a claim that it interfered with the rights of workers to move from one state to another. This Court based its conclusion on the fact that, despite the tax, the individual "is left free to come and go at pleasure", *id.* at p. 275. Similarly, in the case at bar, the rejection of a license application containing false statements does not interfere with the appellant's right of locomotion; he may still "come and go at pleasure" and travel all he wishes.

Edwards v. *California*, 314 U. S. 160, is totally inapposite to the instant case. In *Edwards* this Court simply held that a statute making it a misdemeanor to bring an indigent person into California was unconstitutional because it exerted an "intended and immediate" impact on interstate commerce *id.* at p. 174. No such intention or result can be found in the rejection of the appellant's application in the case at bar.

D.

Finally, although it is not in issue in this Court because it was not decided by the New York Court of Appeals, it is nevertheless clear that there is ample justification for the administrative rejection of appellant's application because of appellant's lack of demonstrated fitness within the meaning of New York Vehicle and Traffic Law § 501(1)(a). As noted above, *supra*, at pp. 5-7, this question does not go to the validity of the statute and, therefore, is insufficient to support jurisdiction by appeal in this Court.

In any event, the appellant's criminal record, in particular his convictions for murder and assault, revealed a lack of respect for the personal safety and rights of other individuals which, if transferred to the highways and the use of a motor vehicle, could make the appellant a menace to others using the highways.

After serving a prison term from 1947 to 1957 on the murder charge, the appellant, while on parole, assaulted someone with a knife and was incarcerated from November, 1961 until November, 1964. At the time of the instant application the appellant had been out of prison less than 6 months. Under these circumstances it was not unreasonable for the appellee to conclude that the potential risk involved, if appellant's disregard for the safety of others were to manifest itself on the highways, was too great *at that time* to support a conclusion of demonstrated fitness. As we have noted above, *supra,* at p. 10, appellant's fitness might be more persuasively demonstrated on a new and proper application at the present time might be significantly greater than it was only shortly after his release from prison. *Cf. Matter of Perpente* v. *Moss,* 293 N. Y. 325, 56 N. E. 2d 726; *Matter of Brown* v. *Murphy,* 34 Misc. 2d 151, 222 N.Y.S. 2d 423.

Certainly, there is a direct and immediate relationship between the proclivities of a person to obey the law and exhibit due regard for the rights and safety of other people and his disposition to operate a motor vehicle with similar regard for the rights of other drivers, rules of the road and laws designed to protect the safety of others using the highways. To arm a person so recently evidencing a propensity for crimes of violence with such a dangerous instrumentality as the motor vehicle is as indefensible as to arm him with a revolver under a license. The Constitution does not require that, before the State can act, a person such as the appellant, who has evidenced such a persistent disregard for the criminal law be permitted an

opportunity to show that he is not, despite this, an unfit person to be given the wheel of the automobile. The demands of safety on the highways require that the State not be compelled to take such a risk under the facts of this case.

This Court has frequently upheld decisions of the New York Court of Appeals which approved administrative determinations denying licenses to persons convicted of crimes. *Matter of Barsky* v. *Board of Regents*, 305 N. Y. 89, 111 N. E. 2d 222, *affirmed*, 347 U. S. 442; *People* v. *Hawker*, 152 N. Y. 234, 46 N. E. 607, *affirmed*, 170 U. S. 189; *DeVeau* v. *Braisted*, 5 N. Y. 2d 236, 157 N. E. 2d 165, *affirmed*, 363 U. S. 144, *rehearing denied*, 364 U. S. 856.

In this posture, reliance by appellant on such cases as *Schware* v. *Board of Examiners*, 353 U. S. 232, and *Wieman* v. *Updegraff*, 344 U. S. 183, is unfounded since the convictions for murder and assault with a deadly weapon appertain and are reasonable considerations in an administrative determination relating to an individual's fitness to operate a motor vehicle. Contrary to supporting appellant's position, *Schware* supports the appellee's denial of the application for a license since that case merely requires that, where an applicant is found unfit, the reasons for such a finding "must have a rational connection with the applicant's fitness", 353 U. S. 239, and, like *Wieman*, requires that fitness be tested by an applicant's conduct and not his beliefs. Appellant's conduct in persistently disregarding the penal laws, especially the penal laws against violence, has a direct and rational bearing upon his fitness to operate a motor vehicle with due regard for the rules of the road and the concomitant safety of others using the highways. This too adds further support to the appellee's determination. And this too is a legitimate incident of the police power and does not present a substantial federal question.

CONCLUSION

The appeal should be dismissed for lack of jurisdiction. In the alternative, the appellee respectfully prays that the judgment of the New York Court of Appeals be affirmed or the appeal dismissed since there are no substantial federal questions.

Dated: New York, New York, June 3, 1966.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. [redacted] 125

REUBEN KEMP, JR.,

Appellant,

against

WILLIAM S. HULTS,
as Commissioner of the Bureau of Motor Vehicles,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

APPELLANT'S BRIEF IN OPPOSITION TO MOTION TO DISMISS

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In the

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OCTOBER TERM, 1965

No. 1298

REUBEN KEMP, JR.,

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WILLIAM S. HULTS,
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ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

APPELLANT'S BRIEF IN OPPOSITION TO MOTION TO DISMISS

Sufficient has been set forth in the Statement as to Jurisdiction to answer appellee's contentions as to jurisdiction and as to substantiality. But in order to clarify the issues succinctly, this brief is respectfully submitted in opposition to appellee's motion to dismiss the appeal.

Jurisdiction

Whether the jurisdiction of this court rests on the federal claim that the appellee could not refuse a driver's license because of appellant's character shown in his criminal record or because of his character based on his omission of two convictions from his otherwise complete recital of his convictions in his application, the federal question is still apparent (as all the judges of the Court of Appeals explicitly recognized). In either case, the character of the appellant was used as a criterion for barring him from using the highways. Appellant contends that the right to freely move on the highways in common with others (after proving his ability to drive safely and related requirements) is as fundamental as the right to assemble or to speak. *Edwards* v. *California,* 314 U. S. 160, points in that direction.

When the appellee rejected Kemp's application solely because of his criminal record, he put in issue his right to do so. He urged that his right to pass on the moral fitness of an applicant derived from the Vehicle & Traffic Law, Section 501 (1)(a) (Record, p. 44, second paragraph). Appellant challenged the authority of appellee under the Vehicle & Traffic Law (including Section 510, subd. 3(c)) if so construed under the Federal Constitution (R. 10, paragraph "11").

In paragraph 11 of the petition (R. 10), Kemp alleged:

> "11. The provisions of the Vehicle & Traffic Law, particularly Section 510, sub. 3(c), which authorizes respondent to revoke an operator's license because of the conviction of a felony, if construed to empower the respondent to reject the application of petitioner on the grounds of a prior conviction for a felony not for a crime connected with safety in operation of a motor vehicle, or for a reason other than petitioner's physical and mental skill in operating such a vehicle, are in-

valid as an abridgement of petitioner's rights under the Constitution of the United States."

In the Court of Appeals, all the judges passed on this federal challenge. Three judges stated:

> "We hold this concealment, although it is not directly related to petitioner's fitness to drive an automobile, is a legitimate ground upon which the Commissioner may exercise his broad statutory powers and deny the petitioner an operator's license, without violating any of the petitioner's rights under the Federal Constitution."

Judge Keating's memorandum states:

> "The Commissioner has ample power to require information concerning an applicant's criminal background since, in my view, criminal conduct is reasonably related to an applicant's powers to operate a motor vehicle."

The dissenting three judges memorandum speaks for itself. It exclusively devoted itself to support appellant's contentions that the statute as construed is unconstitutional under the Federal Constitution.

Thus, all seven judges of the court passed upon the appellant's claim that using character as a test of an applicant for an operator's license was an unconstitutional exercise of power. And if there is any equivocation as to what the three judges of the majority stated, there is none as to Judge Keating and the three dissenting judges, thus making at least a total of four (a majority) judges who passed upon the constitutional question. *Raley* v. *Ohio*, 360 U. S. 423, 436.

To assure this Court, the remittitur of the Court of Appeals was amended to read as set forth on page 2 of the statement, and filed with the transcript of the record.

Because appellant was of the opinion that the *exempli gratia* that appeared in the amendment of the remittitur placed an ambiguous emphasis on the appellant's omission of prior convictions in his operator's application, appellant moved in the Court of Appeals after this case was docketed, for a further amendment to set forth what the appellant contended in that court. That court granted the motion by order dated June 9, 1966, which further amended the remittitur so as to exclude the *exempli gratia*, as follows:

> "Motion to further amend the remittitur granted; the return of the remittitur requested and, when returned, it will be amended by adding thereto the following: Upon the appeal herein there were presented and necessarily passed upon questions under the Constitution of the United States, viz: Petitioner contended that to deny him a driver's license for reasons not directly related to his ability to operate a motor vehicle violated his rights under the privileges and immunities clause of the Fourteenth Amendment as well as his rights under the due process clause of that amendment. The Court of Appeals held that petitioner's constitutional rights were not violated."

The order is set forth herein as Appendix A.

A certified copy of that order is to be filed in this court, simultaneously with this brief.

The order of further amendment in stating, "Petitioner contended that to deny him a driver's license for reasons not directly related to his ability to operate a motor vehicle", might be considered equivocal as to what appellant precisely contended in the Court of Appeals. To clarify any doubts, whether appellant contended that the statute is invalid if construed and applied so as to give appellee power to reject Kemp because of his criminal record, a certified copy of Appellant's Brief in the Court of

Appeals is to be filed in this court as part of the record, and nine copies thereof are transmitted herewith. See, Appellant's Brief, beginning with "Questions Presented" page 5 where the sole question of the appellee's statutory power to deny an operator's license because of the prior criminal record was challenged under the Federal Constitution. When read together with paragraph "11" of the Petition (R. 10) there can be no possible question that the statute, the claimed source of power, was challenged.

Therefore, from the foregoing, it is clear that the appellant in the Court of Appeals raised questions under the Federal Constitution which that court passed upon.

What appears to bother appellee is, as he argues, that the appellant is seeking to have the Vehicle & Traffic Law held unconstitutional when at the same time appellant is seeking a judgment directing the issuance of a license. Of course, appellant is not attacking the validity of Section 501 (1)(a) insofar as it requires that operators be competent to safely drive a car. All that appellant has contended and the Court of Appeals has passed upon, is that the statute as construed and as applied so as to deny him a license because of his character, violates appellant's federal constitutional rights. The record (R. 10), the Appellant's Brief, and the Court of Appeals make amply clear that the appellant's challenges were directed against the statute as construed and applied. Under the circumstances, jurisdiction to review by appeal lies. *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U. S. 282; *Poulos* v. *New Hampshire*, 345 U. S. 395, 402; *Lawrence* v. *State Tax Commission*, 286 U. S. 276, 282.

And if appellant should be wrong in his contentions, this court may treat the appeal as an application for certiorari, 28 U.S.C. Section 2103. The judgment of the Court of Appeals is dated March 31, 1966, the notice of appeal was filed April 29, 1966 and the appeal was docketed in this court on May 10, 1966, well-within 90 days from the date of the judgment.

The Questions Are Substantial

Appellant believes that when three dissenting judges out of seven of the highest court give their opinion—"... that the statute, as now construed and applied, violates the privileges or immunities of citizens' provision of the Fourteenth Amendment to the Federal Constitution since it interferes with the common right to use the public highways (see *Williams* v. *Fears*, 179 U. S. 270, 274)" that alone should be sufficient to conclude that a substantial federal question is involved. When, in addition, it is shown that this court has never passed on the question whether the right to use a highway in common with others can be denied because of a person's moral character, there is additional ground to support the substantiality of the issues raised.

Reference is made to the Statement, pages 8-15, for additional grounds of substantiality.

Cases such as *Matter of Barsky* v. *Board of Regents*, 347 U. S. 442, relied on by appellee are not in point. That case involved the licensing of a person to practice medicine. It involved qualifications for an occupation in which a person dealt with the public. Moral qualification in such a case may be material. In the present case, however, no occupation is involved. Appellant merely seeks to use the highways in common with others.

The appellee never claimed that the appellant's application was false or that falsity was the basis for rejection. Therefore, it is rather startling to find the appellee now urge this point, undoubtedly inspired by some of the language in the opinion of the Court of Appeals. The record is very clear that the only reason for the rejection given by the appellee is the criminal record of the appellant (R. 14, par. "Thirteenth", 29, 43). The appellee, in face of the information he had about the appellant

(R. 12, 13, 14, 15, 43) from the prior application for chauffeur's license, could not have been prejudiced or misled on the second application and could not sincerely have rested his determination on that ground. That undoubtedly was the reason he did not urge that ground. Three judges of the majority rested their decision on this ground, although not urged by appellee, and although not the basis of the appellee's rejection of Kemp. But the federal issue raised and urged by Kemp, that the reason for his rejection cannot be evaded or ignored by a shift to a different ground by the highest court. *Rogers* v. *Alabama*, 192 U. S. 226; *Lawrence* v. *State Tax Commission*, 286 U. S. 276, 282.

The Motion Should Be Denied and Probable Jurisdiction Should Be Noted

The spirit of our jurisprudence is that punishment for crime is for the purpose of rehabilitating an offender. It is not intended that a freed convict be disabled, indefinitely from enjoying the freedom of using the streets in common with others.

Respectfully submitted,

EMANUEL REDFIELD,
Counsel for Appellant.

APPENDIX A

Order.

STATE OF NEW YORK,

IN COURT OF APPEALS.

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the Ninth day of June A. D. 1966.

Present, HON. CHARLES S. DESMOND, Chief Judge, presiding.

Mo. No. 574

In the Matter of the Application of

Reuben Kemp, Jr.,

Appellant,

For a Review of the Determination of William S. Hults, as Commissioner of the Bureau of Motor Vehicles,

Respondent.

A motion to further amend the remittitur having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is granted, the return of the remittitur requested and, when returned, it will be amended by adding thereto the following:

Upon the appeal herein there were presented and necessarily passed upon questions under the Constitution

of the United States, viz.: Petitioner contended that to deny him a driver's license for reasons not directly related to his ability to operate a motor vehicle violated his rights under the privileges and immunities clause of the Fourteenth Amendment as well as his rights under the due process clause of that amendment. The Court of Appeals held that petitioner's constitutional rights were not violated.

AND the Supreme Court of New York County hereby is requested to direct its Clerk to return said remittitur to this Court for amendment accordingly.

A copy,

GEABON KIMBALL,

(SEAL)

END